



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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August 23, 2021

**RECEIVED**

Mary F. Watson, Town Clerk  
Town of Monson  
110 Main Street  
Monson, MA 01057

AUG 24 2021

1020a

TOWN CLERK, MONSON, MA

**Re: Monson Annual Town Meeting of May 10, 2021 - Case # 10132**  
**Warrant Article # 28 (Zoning)**  
**Warrant Articles # 27 and 28 (General)**

Dear Ms. Watson:

**Article 27** - We approve Article 27 from the May 10, 2021 Monson Annual Town Meeting. Our comments regarding Article 27 are provided below.

**Article 28** - We approve the amendments to the Town's general by-laws voted under Article 28, but we must disapprove and delete the amendments to the Town's zoning by-laws because the Town did not hold a planning board hearing for these zoning by-law amendments as required by G.L. c. 40A, § 5.

Under Article 28, the Town voted to amend both the general and zoning by-laws to:

Change the name of the Board of Selectmen to the "Select Board," by striking out, in every instance in which they appear in reference to that body, the words "Board of Selectmen" or "Selectmen" and inserting in place thereof the words "Select Board"; and by striking out, in every instance in which they appear in reference to Board members individually, the word "Selectman" and "Selectmen" and inserting in place thereof the words "Select Board Member" or "Select Board Members."

We approve the portion of Article 28 that amends the general by-laws. However, as explained herein, we must disapprove the portion of Article 28 that amends the zoning by-laws.

General Law Chapter 40A, Section 5 establishes the specific procedure that the Town must follow when amending its zoning by-laws, as follows:

No zoning...by-law or amendment thereto shall be adopted until after the planning board in a...town has...held a public hearing thereon...at which interested persons shall be given an opportunity to be heard....Notice of the time and place of such hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the...town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the...town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting city and town.

Here, the Planning Board did not hold a hearing on the proposed amendments to the zoning by-law or follow any of the notice requirements set forth in G.L. c. 40A, § 5. The failure to hold the Planning Board hearing required under G.L. c. 40A, § 5 is a fatal defect that renders the adoption of zoning by-law amendments inconsistent with state law.<sup>1</sup> For this reason, we must disapprove and delete the portion of Article 28 that proposes to amend the Town's zoning by-laws. The Town should consult with Town Counsel with any questions on this matter.

**Article 27** - Article 27 amends the Town's general by-laws, Article 25, "Brush Fire Permits." The by-law requires a permit from the Fire Chief in order 'to burn certain material, on the permittee's property." Section 1. The by-law also requires the permittee to ensure that the burning is done "in conformance with any conditions set forth in the permit and is done in a safe and controlled manner." Section 2. Included among these amendments are changes to Sections 3, 4 and 5, regarding reimbursement to the Monson Fire Department for costs and expenses, as follows (new text in underline):

A permittee, in requesting such permit, agrees to use such permit in conformance with this by-law and all applicable statutes and regulations, and expressly agrees to reimburse the Monson Fire Department for all expenses and costs, both direct and indirect, of any nature whatsoever, incurred as a result of a fire started pursuant to such permit, at the discretion of the Fire Chief... [Section 3]

Any person burning without a permit in which a fire gets out of control and causes a fire department response, may be held to the same provisions as in Section 3 at the discretion of the Fire Chief. [Section 4]

When obtaining a permit, the person so requesting a permit acknowledges they understand and will comply with this by-law, particularly the reimbursement provisions at the discretion of the Fire Chief. [Section 5]

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<sup>1</sup> Although G.L. c. 40, § 32 (as amended by Chapter 299 of the Acts of 2000), grants this Office the discretion to waive certain defects in the Planning Board notice in certain circumstances, the Attorney General does not exercise that discretion in a situation such as this where the Planning Board did not hold a hearing as required by G.L. c. 40A, § 5.

Sections 3, 4 and 5 require reimbursement to the Fire Department, at the Fire Chief's discretion, for "all expenses and costs, both direct and indirect, of any nature whatsoever" incurred as a result of a fire: (1) started pursuant to a permit or (2) from burning without a permit in which a fire gets out of control and causes a fire department response. However, the by-law does not specify the nature or type of these expenses and costs. In some circumstances, it may be appropriate to require reimbursement to the Town. See G.L. c. 48, § 13 (allowing for the "cost of suppression" in the event of a violation of the statute.). However, in general, the Town cannot require someone to pay the cost of fire suppression services. See Freetown v. New Bedford Wholesale Tire, 384 Mass. 60, 61 (1981) (no authority for recovery by a town for its expense in fighting a fire.) "Safeguards against fire are maintained 'for the benefit of the public and without pecuniary compensation or emolument.'" Id. at 61 citing Tainter v. Worcester, 123 Mass. 311, 316 (1877). The Town should consult with Town Counsel regarding the proper application of the by-law.

**Note:** Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY  
ATTORNEY GENERAL

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cc: Town Counsels Kenneth Albano and Benjamin Coyle

August 24, 2021

APPROVAL OF THE ATTORNEY GENERAL RECEIVED AND DULY POSTED IN FIVE PLACES IN THE TOWN OF MONSON ON AUGUST 24, 2021. THE CLAIM OF INVALIDITY BY REASON OF DEFECT IN THE PROCEDURE OF ADOPTION MUST BE MADE WITHIN 90 DAYS OF POSTING. COPIES MAY BE EXAMINED AT THE TOWN CLERK'S OFFICE.

MARY F. WATSON

*Mary F. Watson*  
MONSON TOWN CLERK